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No. 74

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CONSOLIDATED FREIGHTWAYS, INC., AND OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., APPELLANTS

v.

PIERCE AUTO FREIGHT LINES, INC., LOS ANGELES-SEATTLE MOTOR EXPRESS, ANGELO COLLETTI, DOING BUSINESS AS COLLETTI FAST FREIGHT, PACIFIC MOTOR TRUCKING COMPANY, AND PACIFIC SOUTHWEST RAILROAD ASSOCIATION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the district court (R. 63–72) appears in 57 F. Supp. 192. The decision of the Interstate Commerce Commission (R. 9–44) is unreported.

JURISDICTION

The final decree of the district court was entered on February 6, 1945 (R. 81). Petition for appeal was filed on April 3, 1945 (R. 84), and the appeal was allowed the same day (R. 91). Probable jurisdiction was noted on June 11, 1945 (R. 2621). The jurisdiction of this Court is founded upon the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 203, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

STATUTE INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act are set forth in the Appendix, *infra,* pp. 62–64.

QUESTIONS PRESENTED

1. Whether the court below erroneously overruled the Interstate Commerce Commission's administrative determination that both applications of appellant common carriers by motor vehicle should be granted.

2. Whether the protestant appellees were denied a fair hearing by the Commission.

3. Whether the Commission failed to make adequate findings of public convenience and necessity and of the ability of the applicant carriers to perform the operations involved, based on substantial supporting evidence.

4. Whether the Commission considered the records upon the two applications as though consolidated and based its decision on each application upon evidence introduced in support of the other.

5. Whether changes in conditions after the close of the hearings required rehearing by the Commission.

STATEMENT

This is a direct appeal from a decree of a three-judge district court (R. 81) suspending an order of Division 5 of the Interstate Commerce Commission (R. 45), which granted certificates of public convenience and necessity (R. 45, 47) issued under Section 207 (a) of Part II of the Interstate Commerce Act (Appendix, *infra*, pp. 63–64) to Consolidated Freightways, Inc. ("Consolidated") and to Oregon-Nevada-California Fast Freight, Inc. ("O-N-C"), authorizing extensions of their operations as common carriers by motor vehicle. The certificate granted to Consolidated authorizes extensions from Medford and Klamath Falls, Oregon, to San Francisco, California, and from Lakeview, Oregon, to Redding, California. That issued to O-N-C authorizes extensions from Medford to Portland, Oregon, and from Klamath Falls to Goshen, Oregon. In each case operation was also authorized over certain alternate highways. The order with the accompanying report (R. 9–44), granting applications for these certificates, was

entered on March 1, 1943, in two proceedings.[1] Appellees Pierce Auto Freight Lines Inc., ("Pierce"), Los Angeles-Seattle Motor Express, an Angelo Colletti are common carriers by motor vehicle, operating *inter alia* between San Francisco and Portland (R. 18–22). Appellee Pacific Motor Trucking Company is a subsidiary of the Southern Pacific Company, and, as successor in interest to Pacific Truck Express, performs certain common carrier motor-vehicle operations which are auxiliary to the rail service of the Southern Pacific Company (R. 23, 39). Appellee Pacific Southwest Railroad Association is an association of railroads serving the Pacific Southwest, including the Southern Pacific Company, which operates a line of railroad between San Francisco and Portland (R. 1004, 1276). The four appellees were interveners in the proceedings before the Commission as protestants against the granting of Consolidated's and O–N–C's applications (R. 163–164, 1504–1505) and brought this suit to set aside the Commission's order. Consolidated and O-N-C intervened in the district court in support of the Commission's order and have joined in the appeal to this Court (R. 84–85).

Consolidated, a Washington corporation with headquarters in Portland, Oregon, has operated

[1] No. MC–42487 (Sub-Nos. 15, 18, 19 and 20), *Consolidated Freightways, Inc., Extension*, and No. MC–9115 (Sub-No. 1), *Oregon-Nevada-California Fast Freight, Inc., Extension.*

since 1929 in the transportation of general commodities in California, Oregon, Washington, Idaho, Nevada, Montana, North Dakota and Minnesota (R. 11, 1540–1541). Most of its operations were authorized by "grandfather" certificates issued under Section 206 (a) of Part II of the Interstate Commerce Act, which certificates are not here involved (R. 11).[2]

At the time of its application Consolidated operated routes, among others, from Portland to Seattle, Portland to Spokane, Seattle to Spokane, connecting with routes from Spokane eastward, serving points in northern Idaho and Montana. Another route extended from Portland to Twin Falls, Idaho, through Boise, connecting with a route from Twin Falls through Nevada and California to San Francisco. Two routes extended from Portland to points in southern Oregon. One of these extended down the valley between the Coast Range and the Cascades, through Salem, Albany, Eugene and Grants Pass, to Medford. The other proceeded southeasterly and southerly east of the Cascades, through Bend, to Klamath Falls. This latter route connected in central Oregon with the routes to Twin Falls, to Spokane, and to other interior points. A route serving Marshfield, Oregon, and other points near Coos

[2] "Grandfather" certificates were issued in *Consolidated Freight Lines, Inc., Common Carrier Application*, 11 M. C. C. 131, 27 M. C. C. 697, and 41 M. C. C. 915.

Bay, connected with the Portland-Medford route. (R. 1514.)

By its application, filed January 2, 1940, as amended, Consolidated requested a certificate authorizing extension of its operations from Medford and Klamath Falls to San Francisco,[3] over the Valley Route.[4] Consolidated also requested authority to extend its service from Marshfield, Oregon, to San Francisco over the Coast Route, and from Lakeview, Oregon, to Redding, California, through Alturas, California (R. 42).

O–N–C is a California corporation with headquarters in San Francisco (R. 11, 12). It has operated since 1939 (R. 170) as a common carrier by motor vehicle in the transportation of general commodities from San Francisco to Medford and Klamath Falls, and from San Francisco to Elko, Nevada (R. 12). By application filed January 26, 1940, as amended, it requested a certificate authorizing extension of its operations from Medford to Portland over the Valley Route,

[3] This extension would connect with the Twin Falls-San Francisco route at Sacramento and follow that route (U. S. 40) to San Francisco.

[4] The Valley Route (U. S. 99) is one of the two main north-south highways near the Pacific Ocean. It extends from the Canadian border to southern California, passing through Seattle, Portland, Sacramento and Fresno. The other (U. S. 101) is the Coast Route, lying west of the Coast Range, and passing through North Bend and Marshfield, Oregon, and Eureka and San Francisco, California.

and from Klamath Falls to Goshen, Oregon, as an alternate route. It also sought authority to serve Marshfield and other points in the Coos Bay District. (R. 43.)

Inasmuch as these applications were interrelated to the extent that both requested extensions so that the two carriers, in connection with existing routes, could operate between San Francisco and Portland over the Valley Route, they were set for hearings concurrently at the same place. Hearings before Joint Board No. 11 upon Consolidated's application and before Joint Board No. 5 upon O-N-C's application were held in Portland in July (R. 161–520; 1503–2047), in San Francisco in August (R. 520–938; 2047–2329) and October (R. 938–1408; 2329–2370) and again in Portland in October 1940 (R. 1408–1431; 2370–2371).[5] Each applicant intervened in the proceeding upon the other's application (R. 161, 1505). Several parties appeared as protestants in both proceedings, including appellees (R. 162, 164, 1504–1505). Other parties appeared as protestants in one case or the other. Evidence was submitted by each applicant in support of its proposals, including the testimony of numerous shippers. Protestants submitted evidence in op-

[5] Inasmuch as neither application involved proposed new operations in more than three states, they were necessarily referred to joint boards, as required by Section 205 (a) of the Act (Appendix, *infra*, p. 62). Cf. *American Trucking Associations* v. *United States*, No. 558, October Term, 1944.

position. Neither joint board was able to agree upon recommendations. Accordingly, as required by Section 205 (b) of the Act (Appendix, *infra*, pp. 62–63), the matters were then referred to an examiner of the Commission, who rendered separate reports recommending denial of each application. Exceptions were filed by each applicant and replies thereto were filed by the protestants (R. 10).

The report of Division 5 of March 1, 1943, covered both applications. Reversing the examiner, it found, Commissioner Rogers dissenting, that both applications should be granted insofar as they sought extensions enabling the applicants to operate between San Francisco and Portland over the Valley Route (R. 37–43). Consolidated's proposal to operate between Lakeview and Redding through Alturas as an alternate route and O–N–C's proposed route between Klamath Falls and Goshen as an alternate highway in connection with the Valley Route were also approved (R. 17, 37, 41–43). Consolidated's proposal to extend from Marshfield, Oregon, to San Francisco over the Coast Route and O–N–C's proposal to serve Marshfield and other points near Coos Bay were denied (R. 35–37, 38, 41–43).

For several years prior to the filing of these applications the two carriers had provided a joint through service between San Francisco and Portland and certain other points reached by their

respective lines. Under each application the proposal was to institute through single-line operations in lieu of the joint service involving interchange, and while the applications sought the necessary additional authority to enable each applicant carrier to conduct single-line operations between San Francisco and Portland, such additional authority, it was shown, would permit other important extensions of single-line services, such, for example, as between San Francisco, on the one hand, and Seattle, Spokane, and many other points in Washington, Oregon, Idaho, and Montana, by Consolidated.

The inauguration of single-line services by each of the carriers in lieu of their joint service would eliminate the delays and difficulties incident to the interchange of the traffic at Medford and Klamath Falls and would open the way for fast through schedules, which both of the carriers proposed. Under Consolidated's proposed schedules, 170 points, including Spokane, would receive service to and from San Francisco 24 hours faster than that available by any other means of freight transportation (R. 15). Consolidated's service between San Francisco and Seattle would be speeded up by 22 hours (R. 14). The proposed schedules of both Consolidated and O–N–C between San Francisco and Portland would be over 6 hours faster than that rendered under their joint service (R. 14, 16).

Appendix C of the report (R. 43–44) is illustrative of the then-existing and the proposed delivery service of Consolidated, and the then-existing delivery services of protestants, on traffic from San Franscisco Bay points. For example, the time of delivery at Spokane under Consolidated's proposed service was second morning, equalling the time by railway express, while Consolidated's actual time of delivery (via Medford and Portland, involving interchange with O–N–C) was then third morning, as was that of three protestant motor carriers, and it was fourth day by railroad.

Answering contentions of the protestants that Consolidated and O–N–C could not maintain the faster service proposed in their schedules (R. 28), the Commission pointed to, and discussed, evidence and considerations indicating that the service the applicant carriers were proposing was no faster than they might reasonably be expected to maintain, both readily and with safety; and with respect to this issue, the report says (R. 29):

> We conclude that applicants should be given the benefits of whatever doubts may exist as to their ability to maintain the proposed time schedules. If the proposed speed-up of service is practical for applicants, it also is feasible for other carriers competently managed. Although added competition may force them to do it, none of the protestants proposes a like service.

As noted above (p. 8), Consolidated's application to extend its operations from Marshfield, Oregon, to San Francisco over the Coast Route was denied.[6] O–N–C's application for extension of operations to Portland was granted. Its request to service Marshfield and other points near Coos Bay, Oregon, was denied, but O–N–C is not herein challenging this denial. (R. 37–41, 42, 43.) In each case the Commission found that the present and future public convenience and necessity require the operations authorized by the report and order and that in each case applicant possessed the requisite fitness, willingness, and ability properly to perform such service and to conform to the requirements of the Act and the Commission's rules and regulations thereunder, and that certificates authorizing such operations should be granted (R. 41).

Neither Consolidated nor O–N–C had authority, at the time of their applications, to conduct a single-line service between San Francisco and Portland, although the two carriers had for several years provided a joint through service between those cities, and certain others, by interchange of freight at Medford and Klamath Falls, which cities were then respectively the termini of Consolidated in southern Oregon and the northern

[6] This denial is not attacked in this suit. Much of the evidence bearing on this phase of the case is, under agreement of counsel, omitted from the transcript of record (R. 2622).

termini of O–N–C (R. 11, 12). Prior to July 1939, all freight was transferred at the two interchange points from one truck to another. After that time about one-third of the tonnage was handled in through trailers. (R. 12, 31.) Through trailers, however, effected no savings in time because they had to be held until power equipment arrived (R. 39), and, with respect to the major portion of the tonnage, the method of interchange by transfer of lading was continued (R. 31–34). While the delays at the interchange points were susceptible of reduction by more efficient operation of the two carriers rendering the joint service, such joint service could not have been improved sufficiently to afford service equal to the single-line service proposed by each of the carriers individually (R. 33).

At the time of the hearings, the bulk of all traffic moving by motor vehicle between San Francisco and Portland was transported in the joint service furnished by Consolidated and O–N–C. The volume of this traffic was steadily increasing. The northbound tonnage increased over 200% during the period from January 1938, to May 1940, and during the same period the southbound tonnage increased over 400%. (R. 31, 39.)

Under its application, Consolidated proposed to give daily service between San Francisco Bay points and Spokane, Seattle, and Portland. The following tabulation shows the total elapsed time

required on the date of the hearing to complete transportation between San Francisco and Spokane, Seattle and Portland and the elapsed time proposed by Consolidated under single-line operations, together with the average driving time in miles per hour [7] (see R. 14):

Between San Francisco and	Proposed elapsed time	Present elapsed time	Driving time (speed)
	Hours	*Hours*	*Miles per hour*
Spokane	35½	60	26
Seattle	33	55	26
Portland	25½	32	28

As this table reveals, between these important points the new service would be a full day faster in the case of Spokane, 22 hours faster in the case of Seattle, and 6½ hours faster for the shorter run to and from Portland (see R. 14–15). O–N–C proposed a similarly fast schedule (R. 16–17). As the Commission found, most of the protestants either lacked authority or failed to give the full service which the applicants proposed to render to the intermediate points (R. 30, 39, 40). And the fast schedules proposed would include rapid transportation of freight requiring refrigeration. It was shown that there is a large volume of such traffic from Oregon and Washington (R. 29). About July 1939, Consolidated inaugurated a refrigerated

[7] Concerning the ability to maintain the faster service proposed, see the quotation from the Commission's report at pp. 10–11, *supra*.

service with thermostatically controlled units (R. 30). Although it has been building refrigerator equipment at the rate of four or five a month, it has not been able to meet the demands for refrigerated service by shippers of frozen fruits and vegetables (R. 30). Five of O–N–C's trailers are mechanically refrigerated (R. 16). So far as the record shows, the applicants were the only carriers providing mechanical refrigeration, except appellee Pierce, which had one unit so equipped (R. 30).

The Commission concluded that public convenience and necessity require the operations it authorized and that the applicants were able properly to perform them (R. 41). In reaching these conclusions, the Commission stressed the fact that a number of shippers desired the proposed services. It was pointed out that the grant of the applications would permit the inauguration of rapid shipping service, with refrigerating equipment of the type useful to shippers in the area to be served. (R. 39.) The Commission also found that the proposed service would not impair the operations of existing carriers because of the great increase in the volume of motor-carrier traffic in the northwestern states. Furthermore, it found that existing service was inadequate. (R. 40.)

On April 10, 1943 certain of the protestants, including appellees, filed a joint petition for re-

hearing and reconsideration of both cases by the full Commission (R. 2485–2519). Applicants filed separate replies in opposition (R. 2520–2558; 2558–2580). By order dated August 2, 1943 (R. 6) the Commission denied the petition.

The certificates were issued on September 7 and 15, 1943. Thereupon, no suit challenging the validity of the certificates having been filed (this suit was not brought until four months later (R. 1)), the respective carriers made the necessary arrangements and readjustments and instituted transportation services over the extended routes authorized (R. 59, 83, 93, 94) and these services have since been continuously maintained.

The petition was filed in the court below on January 13, 1944 (R. 1). Hearing was held before the court on April 28, 1944 (R. 102–160). Certified copies of the evidence and certain other parts of the record before the Commission were introduced (R. 103–105, 110–113). On September 20, 1944, the court rendered its opinion (R. 63–72) holding the Commission's order invalid.

On February 6, 1945, the court entered its findings of fact and conclusions of law (R. 74–81). On the same date it entered its decree (R. 81–83), remanding the proceedings to the Commission for rehearing and suspending[8] both the Com-

[8] The Urgent Deficiencies Act authorizes an appeal to this Court from an order of the specially constituted District Court enjoining, setting aside, annulling, or "suspending" any order of the Commission (38 Stat. 208, 220).

mission's order and the certificates issued pursuant thereto pending completion of the proceedings before the Commission upon the rehearing ordered. On February 21, 1945, the court entered an order (R. 83–84) finding that a stay "is necessary to preserve the status quo * * * and that irreparable damage to interveners [Consolidated and O–N–C] and disruption of existing public common carrier services would otherwise result" (R. 83). The order recited that "plaintiffs [appellees] herein have filed a written statement with this Court expressing themselves as being not opposed to the grant of such a stay" (*id.*), and ordered that the decree be stayed pending determination of this appeal.

SPECIFICATIONS OF ERRORS TO BE URGED

The district court erred:

1. In deciding that the Commission should not have granted both applications.

2. In holding that appellees were denied a fair hearing by the Commission.

3. In holding that the Commission failed to make adequate findings of public convenience and necessity and of the ability of the applicants to perform the operations involved, based on substantial supporting evidence.

4. In holding that the Commission considered the records upon the two applications as though consolidated and based it decision upon each application upon evidence introduced in support of the other.

5. In holding that changes in conditions after the close of the hearings required rehearing by the Commission and in remanding the proceedings to the Commission for rehearing.

6. In suspending the Commission's order and the certificates issued pursuant thereto.

7. In failing to dismiss the complaint.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission properly determined that both applicants should be permitted to inaugurate single-line services between San Francisco and Portland. The question whether public convenience and necessity require these services was administrative and accordingly for the Commission. *Interstate Commerce Commission* v. *Parker,* Nos. 507–8, October Term, 1944.

The Commission's determination was buttressed by its finding that the protestant appellees' operations were inadequate, and that grant of the applications would not impair appellees' operations, in view of the great increase in the San Francisco-Portland traffic. Furthermore, it was found that the proposed operations would be superior, and that Consolidated's proposed extension from Klamath Falls to San Francisco would provide a shorter single-line route between San Francisco and Spokane and numerous other interior points, over which Consoli-

dated would accord faster service than that available by any other means of freight transportation. In indicating that only one of the applications should have been granted, the court below substituted its judgment for that of the Commission upon an administrative question, and plainly erred.

II

The Commission made adequate findings, supported by substantial evidence, of public convenience and necessity for the proposed operations. The Commission found that applicants proposed faster service than that then rendered, and that, unlike appellees, they possessed needed refrigerator equipment, and that they would serve intermediate points not served by appellees. Both applicants were willing to split the traffic formerly handled by them in their joint operations, and it is plain that the shipping public would be benefited by this new competition.

The findings of the Commission are sufficient that applicant Consolidated would be able to maintain the proposed operation, and they are supported by substantial evidence. Consolidated operates a lucrative and far-flung network of lines. Its financial statements indicated aggregate assets of almost $3,000,000, and shippers testified to its reliability. Applicant O-N-C's ability to establish this service is not challenged.

III

The court below held that appellees were denied a fair hearing on the grounds (1) that they had no notice that both applications might be granted and (2) that the record was not made upon such a basis. Appellees did not raise these grounds before the Commission or the district court, and accordingly they were waived. *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1, 3–4. However, even on the merits, these grounds are unmeritorious.

Appellees were served with the applications which showed that both applicants sought the extensions described. Appellees received further notice from the character of the testimony of applicants' witnesses at the hearings, which appellees attended. Inspection of appellees' evidence reveals that they conducted their case upon the assumption that both applications might be granted.

IV

Substantial evidence in each record supports the Commission's findings that public convenience and necessity require the respective extensions of service, and neither finding is based upon evidence in the other record. The court below failed to observe that, by agreement of the parties, the two records were consolidated to a large extent. This consolidation included all of appellees' affirmative evidence in opposition to the two

applications, which, by stipulation, was incorporated into and made a part of both records. Both records were complete.

The district court cited no instances to show that the Commission based its findings upon the record of the two proceedings without discrimination, and we maintain that an examination of the Commission's report discloses no such instance. Instead, substantial evidence appearing in the respective dockets supports the Commission's conclusions.

V

The Commission was not required to grant appellees a rehearing. Both applicants replied to appellees' petition for rehearing and demonstrated that the claimed changes in conditions were immaterial. It was for the Commission to weigh these claims and to determine whether or not to grant a rehearing. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503.

ARGUMENT

I

THE COURT BELOW ERRED IN OVERRULING THE COMMISSION'S DETERMINATION THAT BOTH APPLICANTS SHOULD BE PERMITTED SINGLE-LINE SERVICES BETWEEN SAN FRANCISCO AND PORTLAND

Two applications submitted to the Commission by appellant carriers included proposals for extensions of lines which would enable them, coupled

with their existing authority, to operate over the Valley Route between San Francisco and Portland and permit single-line services by each between those points and many other points reached by their respective lines, including, in the case of Consolidated (but not O-N-C), single-line service between San Francisco and Tacoma and Seattle, over the Valley Route, and between San Francisco, on the one hand, and Spokane, and numerous other points served by Consolidated in central and eastern Washington and Oregon, northern Idaho, and Montana, over its proposed route through Klamath Falls (R. 14–17). The court below, though recognizing that "the field of judicial review of administrative determination has been narrowly confined," held that "the courts must in a litigated case, be the arbiters of the paramount public interest" (R. 68), thereby assuming that the question whether public convenience and necessity required the operations involved was one for its own ultimate determination. With this understanding of its function, the court gave independent consideration to the question whether both applications should be granted, insofar as they sought extensions enabling both to operate single-line services over the Valley Route between San Francisco and Portland, and apparently reached the conclusion that only one of these extensions should be approved, overruling the Commission's judgment that public convenience and necessity required both services.

The question whether public convenience and necessity required these proposed extensions was administrative in nature and accordingly for the Commission rather than the courts. As was recently said in *Interstate Commerce Commission* v. *Parker,* Nos. 507–8, October Term, 1944, slip opinion, p. 4, "The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity," and this "gives administrative discretion to the Commission * * * to draw its conclusion from the infinite variety of circumstances which may occur in specific instances". See also *United States* v. *Detroit & Cleveland Nav. Co.,* No. 22, this Term; *Barrett Line, Inc.* v. *United States,* No. 630, October Term, 1944, slip op. 17; *Alton R. Co.* v. *United States,* 315 U. S. 15, 23; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 140, 146; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287; *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 508.

The Commission gave careful consideration to the question whether both carriers should be granted authority to operate single-line services between San Francisco and Portland, in lieu of their existing joint service involving interchange, and reached the conclusion that such authority should be granted. It found that at the time, in addition to the then-existing joint service of

O–N–C and Consolidated, there were several other motor carriers operating over the Valley Route between San Francisco and Portland but, after considering the operating authorities and services performed by each of these carriers (R. 13, 18–27), it concluded that they either lacked authority or were unwilling or unable to accord the superior service to the public which the applicants were willing and able to render (R. 29, 30, 39, 40).

The Commission also considered whether approval of applicants' proposals would so endanger or impair the operations of the other carriers as to be contrary to the public interest, and was unable to find that it would have that effect (R. 40). This conclusion was reached after weighing all of the evidence, and especially that showing that the traffic between San Francisco and Portland had greatly increased during the several years prior to the hearing and was still increasing (R. 31, 40). Additionally, it was noted that there was no existing service to the central and eastern Oregon and Washington points on Consolidated's proposed single-line route from San Francisco through Klamath Falls (R. 40).

The Commission further found that Consolidated and O–N–C were transporting in their joint service the bulk of the motor-carrier traffic between San Francisco and Portland (R. 39). This joint traffic was transported by O–N–C between

San Francisco and Medford or Klamath Falls and by Consolidated between those interchange points and Portland (R. 11–14). As both Consolidated and O–N–C fully appreciated, grant of authority enabling both to operate between San Francisco and Portland would split the traffic between them, but in that event each would carry its portion of the traffic all the way between San Francisco and Portland, without dividing the revenue, and this through single-line service would save the applicants the cost of interchange, amounting at Medford to fifteen or sixteen hundred dollars a month (R. 40), and avoid the damage and delay to the traffic incident to the interchange (R. 27, 32–33, 35, 37). Both Consolidated and O–N–C were of the opinion that they would be better off if allowed to operate straight through without the necessity of interchanging traffic (R. 31, 33, 40). The Commission reached the conclusion, for reasons that seemed to it obvious, that "authority should be either granted or denied to both applicants to operate over the Valley Route" (R. 39).

Denial of both applications would withhold from the public the superior single-line service which these carriers offered to the public between San Francisco and Portland, and would also deny to the numerous cities and towns in eastern Washington and Oregon and surrounding territory the advantages of the improved transporta-

tion service offered by Consolidated to and from San Francisco over its proposed route through Klamath Falls. In addition to the evidence supporting both applications for authorization of extensions over the Valley Route permitting single-line service between San Francisco and Portland, there was strong evidence supporting this proposal by Consolidated alone for extension from Klamath Falls to San Francisco to open the way for fast, efficient single-line service between the interior points on the proposed route and San Francisco.

After consideration of these and other facts established by the voluminous records before it, in which the pertinent transportation facts were shown in minute detail, the Commission determined that public convenience and necessity required the extensions involved here (R. 41). In indicating that only one application should have been granted, the court below overruled the administrative determination. We contend that in doing so, it substituted its judgment for that of the Commission upon an administrative question, and plainly erred. *United States* v. *Detroit & Cleveland Nav. Co.*, No. 22, this term; *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1, 2–3; *Gray* v. *Powell*, 314 U. S. 402, 412; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320, 321; *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, 547; *Inter-*

state Commerce Commission v. *Ill. Cent. R. R.*, 215 U. S. 452, 470.

II

THE COMMISSION MADE ADEQUATE FINDINGS, SUPPORTED BY SUBSTANTIAL EVIDENCE, OF PUBLIC CONVENIENCE AND NECESSITY OF THE PROPOSED OPERATIONS AND OF APPLICANTS' ABILITY TO CONDUCT THE OPERATIONS

The Commission's report, after stating the precise authority sought by each applicant (R. 10–11, 42–43), the existing service rendered by each (R. 11–14), the new services proposed (R. 14–17), and the fact that 120 shipper witnesses supported one or the other of the two applications (R. 17), discusses in detail the service of each of the protestants (R. 18–27), and then reviews comprehensively the evidence bearing upon the question whether public convenience and necessity warranted the proposed extended services (R. 27–37). The report discloses that applicants proposed a faster and superior service over the suggested routes than was then rendered or proposed by any other carriers (R. 28–29); that this service included transportation of Oregon's and Washington's production of frozen fruits, vegetables, and numerous other perishable products in mechanically refrigerated motor equipment possessed by applicants, and that other carriers (except appellee Pierce, which had one unit so equipped) did not offer this refrigerated service, which was

deemed valuable by the shippers (R. 29–30); that applicants proposed to serve all intermediate points, whereas most of the other carriers were either not authorized to serve such points or, having authority, were not in fact serving them (R. 30–31); and that the through single-line service proposed by applicants was superior in many respects to their own then-existing joint service involving interchange of the traffic (R. 31–34). The report deals also with Consolidated's proposal to give faster, superior, single-line service between San Francisco and eastern Oregon and Washington through Klamath Falls (R. 34–35). After covering these and other matters, the report concludes (R. 37–41) that "public convenience and necessity require [authorized] operations," and that each applicant is "fit, willing, and able properly to perform such service" (R. 40, 41).

In view of these ample findings, there is a complete absence of warrant for the holding below that the Commission contented itself with a "formal finding" of public convenience and necessity as to each applicant, and failed to "find affirmatively upon the vital matter of interest and convenience of the public" (R. 66, 67). On the contrary, the Commission indisputably made affirmative findings upon the vital matter of public convenience and necessity, which meet the criteria of the statute (Section 207 (a), Appendix, *infra*, pp. 63–64).

The district court expressed doubt whether the Commission's findings of public convenience and necessity are sufficient "as to the complicated set of facts involved here in turning a cooperative system into two competing through-route operations," (R. 66) but the Commission's report deals fully with this subject. It points out the delays, difficulties and expense incident to the interchange between the two carriers in the operation of their cooperative system, and the disagreements between the two carriers both as to method of loading and types of equipment for the joint service (R. 32–33). The report further points out that the cooperative system had already been partially disrupted. Increase in through traffic between San Francisco Bay points and points in Oregon and Washington had caused O–N–C to participate in joint rates with other carriers which served Medford, and O–N–C had diverted much of its traffic formerly interchanged there with Consolidated to a competitor of the latter (R. 32).

The installation of the two competing single-line routes would, of course, result in a split of the San Francisco-Portland traffic, but the two carriers were willing to accept the split, and both were of the view that they would be better off with their own single-line service. The report states that Consolidated's president believed "that in the event its application is granted this tonnage [the northbound and southbound tonnage handled

by the two carriers] would be split equally" between Consolidated and O–N–C, while O–N–C's president expressed the belief "that his company would retain 65 percent of the northbound tonnage and that Consolidated would retain 65 or 70 percent of the southbound tonnage" (R. 31). The report further states that O–N–C will be bettered financially "if the requested certificate is granted, notwithstanding the possible split of the available tonnage; that the delay at Medford [incident to interchange with Consolidated] could be reduced by one-third by efficient operation of both applicants; and that the joint service could not be improved sufficiently to give service equal to that proposed here" (R. 33). "Each applicant," the report states, "claims that it will be better off if allowed to operate straight through without the necessity of interchanging at Medford." The report found, as we have shown, that approval of the proposals for two competing single-line routes between San Francisco and Portland in lieu of the one joint-line route would not so endanger or impair the operations of existing carriers as to be contrary to the public interest, and this was coupled with the significant finding that "the traffic northbound as well as southbound is increasing." (R. 40.)

The authorization of two single-line routes between San Francisco and Portland, under the circumstances shown, would give the shipping

public the benefit of service which reasonable competition would bring about.[9] In *Chesapeake & Ohio R. Co. v. United States,* 283 U. S. 35, 42–43, this Court said, in upholding a certificate authorizing construction of extension of a railroad line:

> In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest * * *. And the Commission has recognized the advantages of competitive service to shippers * * * that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest.[10]

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[9] The filing of the applications by Consolidated and O–N–C spurred at least one competitor to improve its service. After the applications were filed, and a few weeks prior to the hearings thereon, appellee Pierce instituted a daily service between Portland and San Francisco, in lieu of its prior weekly service (R. 22, 39, 40).

[10] See, *e. g., Mt. Hood Stages, Inc., Extension—Boise-Salt Lake City,* 44 M. C. C. 535, 548, in which the Commission said:

> Both the courts and the Commission have long recognized that reasonable competition is in the public interest. Regulated monopoly is not a complete substitute therefor. Competition fosters research and experimentation and induces refinements in service which might not otherwise be accomplished. *Santa Fe Trail Stages, Inc., Common Carrier Application,* 21 M. C. C. 725, 748, 749; *Burlington Transp. Co., Com-*

Cf. *United States* v. *Detroit & Cleveland Nav. Co.*, No. 22, this Term.

The court below also held that the findings in regard to the fitness or ability of Consolidated to maintain a single-line operation were insufficient (R. 66, 67, 69) and stated in its findings of fact (Finding XIII, R. 79) that "the Commission failed to find, and there is no evidence in either record to support such a finding, that Consolidated is adequately equipped to establish and maintain the proposed through-line operations under any conditions."

The Commission's report, in a paragraph captioned "Fitness," discussed the fitness and ability of the applicants to conduct the proposed services, and, also, the question of profitableness of the proposed operations (R. 40). It stated (*id.*) that "There is no doubt as to O–N–C's fitness, financial or otherwise, to conduct the operations herein authorized, although protestants question Consolidated's financial ability to conduct the proposed operation." Both O–N–C and Consolidated submitted substantial evidence to show their fitness and ability to perform the proposed services, and on the basis of this evidence the Commission found

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mon Carrier Application, 33 M. C. C. 759, 767. Indeed, we cannot say that the enterprise of Stages and I. T. L. in the development of air-conditioned busses was not due in a measure to the spur of competition, which is present over the greater part of their combined system.

that each applicant "is fit, willing, and able properly to perform" the service authorized (R. 41). Since there is no suggestion that this finding is unsupported by the evidence so far as O–N–C is concerned, it is necessary to refer only to the evidence supporting the finding as to Consolidated.

Consolidated has been in operation since 1929 (R. 1540), and has since experienced a consistent growth (R. 1541). By 1940 its operations extended from San Francisco, Portland and Seattle as far east as Minnesota, and it operated a network of lines in Oregon and Washington (R. 11–12). Its revenues for the first year were approximately $600,000. During the following ten years its revenues steadily increased, rising to approximately $3,750,000 in 1939. (R. 1541.) In every year throughout its operation it has earned profits, except in the depression year 1932 (R. 1543). It is largely owned by people who are actively engaged in the business, and since its inception has been financed almost entirely out of earnings (R. 1542–1543). On the date of the hearing it maintained 20 terminals and 48 commission agencies in Oregon, including terminals in southern Oregon at Medford, Grants Pass, Roseburg, Klamath Falls, Marshfield, Coquille, and Lakeview; 9 terminals and 24 commission agencies in Washington, and terminals in California at San Francisco, Oakland and Sacramento (R. 1541–1542).

Numerous shippers testified that Consolidated is a reliable carrier and that its service is satis-

factory and dependable (see, *e. g.*, R. 1604, 1671, 1699, 1726, 1737, 1750, 1850, 1876). Its officials are all men of long experience in the motor carrier field (R. 1545–1546). It maintains a safety engineering department with a school for drivers and has an outstanding safety record, in 1939 receiving an award for safety (R. 1545). Its balance sheet, a copy of which it introduced as Exhibit 8, showed, as of May 31, 1940, total current assets of $482,945.90, including $100,245.98 cash on hand, $225,249.30 in accounts receivable, $150,027.51 in inventories (such as automobile parts, gas, oil, and tires), and other assets of $2,452,769.22, or aggregate assets of $2,935,715.12. The latter figure included trucks worth over $1,000,000, and tractors, trailers and other automotive equipment worth half a million dollars." (R. 2434.)

In the event of the granting of its application, Consolidated would abandon its separate terminals at San Franscisco and Oakland and erect a new terminal in Oakland, costing about $60,000. This cost could be financed over a long period and would require a cash outlay of only about $10,000. A new terminal would be established at Sacramento, involving an immediate expenditure of $2,000. No new terminals would be required in Oregon or Washington. (R. 1541–1543.)

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[11] In *Consolidated Freightways, Inc.—Purchase—Reymers*, 36 M. C. C. 623, 625, it was found that Consolidated "owns and operates in excess of 500 motor vehicles."

If O–N–C's application were also granted, and the traffic consequently split between the two companies, the equipment which Consolidated then had would be sufficient, since it would obtain a greater utility out of its equipment resulting from obviation of the delay incident to the interchange of the traffic at Medford and Klamath Falls. Consolidated already had on order sufficient equipment to take care of its normal expansion of business, but if additional equipment were needed, it would be in a position to furnish it. It would use the same type of equipment it had been using, *viz.*, truck and trailer combinations, with a considerable amount of mechanically refrigerated equipment, to take care of the "big flow of cargo between the points that require refrigeration." (R. 1543–1545.)

The above-mentioned "Fitness" paragraph in the Commission's report deals also with the question whether the two proposed single-line operations between San Francisco and Portland would be profitable, and states (R. 40):

> Protestants contend that if these applications are granted each applicant will operate at a loss. Each applicant of course claims that it will be better off if allowed to operate straight through without the necessity of interchanging at Medford. Elimination of the cost of transfer at Medford would save approximately fifteen or sixteen hundred dollars a month. Considering the

> fact heretofore discussed in some detail, we are of the opinion that we should give applicants the benefit of any doubts that may exist as to whether they could operate successfully over the routes authorized herein.

Under the facts in this record, showing strong public convenience and necessity for the services authorized, the Commission was fully warranted in resolving in applicants' favor "any doubts" regarding the financial success of the operations.[12]

In view of the foregoing, we submit that the Commission's findings that public convenience and necessity require the operations authorized and that the carriers are fit, willing, and able to conduct these operations, are adequate and that these findings are supported by substantial evidence.

III

APPELLEES WERE ACCORDED A FAIR HEARING IN THE PROCEEDINGS BEFORE THE COMMISSION

One of the principal grounds upon which the court below held the Commission's order invalid was that appellees were denied a fair hearing in that they were given no notice that both applications might be granted, and that "the record was

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[12] In other cases, the Commission has likewise resolved such doubts in favor of applicant carriers. See, *e. g.*, *Cantlay etc. Application*, 10 M. C. C. 743, 752; *Drum Extension of Operations*, 2 M. C. C. 788, 791.

not made upon the basis that two through-line operations might be allowed" (R. 66, 67, 69).

However, appellees made no claim, either before the Commission or before the court below, that they were denied a fair hearing on these grounds. While the Act does not expressly require a hearing in a case of this kind, it is the Commission's practice where a protest is lodged, as here, to hold a hearing.[13] Appellees appeared as protestants in the hearings in these cases and were given full opportunity to cross-examine applicants' witnesses and to present fully their own affirmative evidence in opposition to the applications. After the decision by Division 5, they submitted a petition for rehearing, and introduced in the court below a certified copy thereof (R. 2485–2519). If appellees felt that there was any unfairness to them resulting from the manner of conducting the hearing, they were at liberty to bring that alleged unfairness to the Commission's attention in their petition, but the petition made no claim of an unfair hearing on the above-mentioned grounds relied on by the district court. (See Sections 17 (9) and 205 (h).) Nor did appellees raise such grounds in their petition to

[13] Section 207 (a), Appendix, *infra*, pp. 63–64, dealing specifically with the issuance of certificates, does not by its terms require a hearing, nor does any other Section of Part II of the Act. Section 205 (e), Appendix, *infra*, p. 63, a general provision, provides for notice to "interested parties" and for participation in a hearing, if a hearing is held.

the court (R. 1–9) or in oral argument before the court (R. 102–160). Accordingly, we submit that appellees' failure to complain in these respects either to the administrative or the judicial tribunal must be taken as a waiver of any lack of fairness in the hearing before the Commission. As was said in *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1, 4:

> The Court endeavors to protect the right of parties to fair hearings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the court below.

Even assuming that appellees had not waived these grounds, we contend that they lack merit, for the applications themselves, copies of which were served upon appellees, indicated that, if granted, both applicants, in conjunction with operating rights already held, would have authority to conduct single-line operations between San Francisco and Portland (see R. 10–11). Nothing in the applications made the granting of one dependent upon the action taken upon the other; they were neither interdependent nor mutually exclusive and both sought the extensions described.

If the applications did not sufficiently put appellees on notice that both applicants sought extensions enabling both to operate single-line services between San Francisco and Portland,

appellees could not have failed to receive such notice from the testimony of applicants' witnesses. Appellees, by their counsel, appeared at both proceedings as protestants (R. 163–164, 1504–1505), attended the sessions before the joint boards in which applicants' evidence was submitted and thereby became fully informed of the nature of applicants' proposals, which were explained in great detail; and each applicant presented evidence of a most substantial nature in support of the proposals for each to operate all the way between San Francisco and Portland.[14] The following statements of record indicate that all parties understood that two independent applications were under consideration and that both might be granted.

Witness James, president of Consolidated, in the course of his direct testimony, made the following statement:

> At the present time we are handling a nice volume of business out of San Francisco to Oregon and Washington points through the Oregon - Nevada - California Fast Freight. They also have an application

[14] See R. 1514, and map, Exhibit 1, Docket MC–42487, showing Consolidated's then-existing routes and the proposed extensions; and see R. 168–169, 170, and map, Exhibit 1, Docket MC–9115, showing similar information as to O–N–C. These maps are before the Court as original exhibits but under stipulation (R. 2621) are not reproduced in the printed transcript.

pending before the Board [Commission] for the right to give a through service.

I would be led to believe that the present business would possibly be split between the two companies * * *. (R. 1543–1544.)

The following question was asked on cross-examination of Mr. James by counsel representing the railroad protestant and protestant Pacific Truck Express:

Q. [By Mr. FARRENS]. Now, I understood you on direct examination to express the opinion that if your application is granted and the applications of the Oregon-Nevada-California Fast Freight is likewise granted, that the result would be that the two companies then will approximately split the present business which is interchanged between them [at] Medford; is that correct? (R. 1571.)

Mr. James' reply was in the affirmative (*id.*)

Edward B. Williamson, jobber in bearings at Seattle, Washington, who testified in support of Consolidated's application, was cross-examined by counsel for O–N–C as follows:

Q. [By Mr. BEROL]. Do you know, Mr. Williamson, about the application pending by the Oregon-Nevada-California Fast Freight?—A. I didn't know until I walked in the room a few minutes ago.

Q. Have you learned something about it since you came here?—A. Yes.

Q. Now, do you understand that under

that application there is a service offered between Seattle and San Francisco that is a two-day service?—A. That is what I understand.

* * * * *

Q. Would you like to see both applications granted?—A. Competition is a pretty good thing.

Q. Would it be your position before this Commission that full competition should be preserved?—A. I don't know why not. I get it. (R. 1746.)

Witness Kimsey, district manager of the Sperry Flour Company of Tacoma, Washington, who testified in support of Consolidated's application, stated on cross-examination that he was aware of the application of O–N–C and that it was the intention of his company to support that application as well as Consolidated's (R. 1747–1750, 1752).

The following question by a member of the Joint Board to President Gritsch of O–N–C further indicates the understanding of the parties:

Board Member BROWN. Mr. Gritsch, of the traffic that is moving at the present time, and assuming that both applications were granted, have you any opinion to express as to the future division of that business?

The WITNESS. Well, I think that if both applications were granted, I think I would still keep 60 or 75% of the [northbound]

> business that I am getting now * * * I would say probably southbound they [Consolidated] would probably get 65% of it or 70 [and the O–N–C the remainder]. (R. 845–846, 847.)[15]

Moreover, appellees introduced all their affirmative evidence with the definite understanding that it was to be considered by the Commission as in opposition to the granting of both applications. Appellees' evidence was taken at the hearings beginning October 16, 1940 (R. 984–1408). At their opening, the presiding board member made the following announcement:

> Chairman TERRIL. The record will show now that we are on the case of Oregon-Nevada-California Fast Freight, which is MC–9115, Sub No. 1. The testimony from now on, unless otherwise specifically directed, is in the Consolidated Freightways, Inc. case and also the Oregon-Nevada-California Fast Freight case. That is, the Protestants' case is to be consolidated into both cases and incorporated by reference. (R. 985.)

Later, it was formally stipulated by counsel for the respective parties that this evidence (described in the stipulation as pages 1416–2454 of the O–N–C record (R. 942–1408)) should be incorporated by

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[15] See, for further examples, R. 177, 182, 209, 217–218, 226, 614–616, 756, 823, 824, 844, 846–847, 852–853, 888, 1215–1216, 1348–1349, 1668, 1735, 1893, 2056, 2133, 2136, 2140.

reference intb the Consolidated record (see R. 2307, 2335).[16]

Inspection of their evidence shows that appellees conducted their case upon the assumption that both applications might be granted. In an attempt to show that their service between Portland and San Francisco was adequate and no additional motor-carrier service between those points was necessary, they submitted extensive testimony of their operations and servce.[17] They introduced other testimony bearing upon the issue of public convenience and necessity, and one of the protestants presented the testimony of shipper witnesses concerning the adequacy of the existing services over the Valley Route (R. 17). They further presented evidence in an attempt to show that if applicants were granted the additional authority sought, both would operate at a loss (R. 40), that applicants could not maintain the speed called for by their proposed schedules (R. 28–29), and that both could continue to give satisfactory service by maintenance of the joint-line operations with interchange (R. 39).

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[16] Apparently a pagination error was made in the stipulation. The evidence on pages 1416–1494 of the O–N–C transcript (R. 942–984) was put in by applicant O–N–C. Appellees' testimony began on page 1495 (R. 985). The stipulation should have read: "Pages 1495–2454."

[17] Findings upon this testimony are made in the Commission's report under the heading "Protestants' Service" (R. 18–27) and the opinion of the court below concedes the accuracy of these findings (R. 70).

In sum, it appears that the record was made upon the basis that two single-line operations might be allowed, that the parties fully understood that such a result was possible, that the appellees had notice of the applications and fully understood that both might be granted, that the appellees were given full opportunity to maintain their rights and present their defense, that they were in fact accorded a fair hearing, and that no complaint on these scores was lodged either with the Commission or the district court. We submit, therefore, that the court erred in holding to the contrary.[18]

IV

SUBSTANTIAL EVIDENCE IN EACH RECORD SUPPORTS THE COMMISSION'S FINDINGS THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE RESPECTIVE EXTENSIONS OF SERVICE; NEITHER FINDING IS BASED UPON EVIDENCE IN THE OTHER RECORD

We believe that the court below erred in sus-

[18] The court erred in characterizing the proceedings before the Commission as "an adversary proceeding by two applicants to establish a basis for one through-line operation" (R. 69). There were two independent applications, both seeking authorization of extensions which would permit both to operate single-line services between San Francisco and Portland. The record shows plainly that the respective applicants were not each other's adversaries. Each intervened in the other's proceeding but neither protested the other's application, nor did either support the other's application. Their officials understood clearly that both applications might be granted (R. 31, 33).

taining appellees' contention that in granting both applications, insofar as they sought authority to extend their services over the Valley Route, the Commission considered certain evidence appearing in only one of the records.

Voluminous evidence was submitted by each applicant in support of its proposed extensions of service over the Valley Route. Each showed the difficulties and delays incident to the interchange of the traffic handled jointly by them (R. 31–34) and that, with the necessity for interchange obviated by the establishment of through single-line service, faster, more satisfactory and more efficient service would be accorded (R. 14–17, 28–29). Each submitted evidence showing the need of service at intermediate points, which each proposed to render (R. 30–31). Each showed that it was prepared to meet the demand of shippers for expeditious transportation of perishable products in mechanically-refrigerated equipment (R. 16, 29–30). Each presented a host of shipper witnesses who supported its application. The Commission weighed the evidence submitted by each and concluded in each case that that evidence was substantial, that it amply proved public convenience and necessity, and fully warranted the granting of the application.

In reaching its conclusion that the Commission drew upon evidence in one record to bolster the other, the court below seemingly failed to observe

that, by agreement of the parties, the two records had been consolidated to a large extent. This is true, as we have seen, in respect of all of appellees' affirmative evidence (*supra,* pp. 41–42). Generally, the affirmative evidence submitted by each carrier in support of its application, including testimony of their presidents and of their other officials having knowledge of the pertinent facts, and also including voluminous supporting shipper testimony, was kept separate in the respective dockets, although much of that evidence, after having been taken in one record, was incorporated by reference in the other.[19]

[19] The testimony of witnesses Lee (R. 414–432), Toye (R. 473–484), Gregg (R. 603–617), Brannon (R. 745–762), Wilsey (R. 774–786), and Underhill (R. 786–804) in the O–N–C case was introduced in the Consolidated case as Exhibits 21, 22, 23, 24, 27 and 28. See R. 2336, 2355–2356.

The testimony of witness Berger in the Consolidated case (R. 1886–1898) was incorporated, by reference, into the O–N–C case (R. 166, 1899).

The testimony of witnesses Hanns (R. 1966–1975), Marshall (R. 1975–1985), Cook (R. 1986–1993), Moore (R. 1993–1994), Brownson (R. 1994–2012), Brosy (R. 2012–2015), Austin (R. 2016–2021), Gray (R. 2021–2027), and Swan (R. 2027–2037) in the Consolidated case was incorporated, by reference, into the O–N–C case. See stipulation (R. 1966, 2037).

The testimony of J. A. Gritsch, O–N–C's president, in the O–N–C case was incorporated in the Consolidated case. This included his direct testimony appearing in O–N–C transcript at pp. 1219–1246 (R. 834–849) and the cross-examination that followed (R. 849–918), and apparently the other testimony of this witness appearing at R. 170–188 and R. 281–296. See stipulations (R. 2357–2358, 2369).

But a great deal of the evidence, particularly that concerning applicants' proposed single-line services between San Francisco and Portland, related to both applicants, in view of the fact that their proposed San Francisco-Portland single-line services would supersede their joint service involving interchange of traffic. The president of Consolidated testified about this joint service and the interchange (R. 1544, 1546–1549, 1920–1937, 2049–2092) as did other witnesses for Consolidated (R. 1516–1517, 1785–1787, 1795, 2093–2122, 2155–2164, 2188–2208, 2310–2320). This evidence appears in the Consolidated record. Likewise, officials of O–N–C testified in that regard, including its secretary (A. H. Gritsch, R. 810–834) and its president (J. A. Gritsch, R. 834–918). The latter's testimony on direct and cross-examination covered this subject in great detail, and this testimony, taken in the O–N–C case, was subsequently made a part of the record in the Consolidated case,[20] with the result that the details in regard to this joint service and the interchange are in both records.

Applicants' testimony in rebuttal of protestants' evidence, taken on October 31, 1940, in the O–N–C case (R. 1408–1431), by stipulation of counsel (R. 1408), was made a part of the record in the Consolidated case.

[20] A copy of the cross-examination was introduced in the Consolidated case as Exhibit 29 (R. 2357–2358). Later, under stipulation of counsel (R. 2369–2370), the direct examination was incorporated, by reference, into the Consolidated case. See footnote 19, p. 45, *supra*.

In general, findings relating exclusively to Consolidated, such as those pertaining to its existing and proposed services, and the finding that public convenience and necessity required certain of its proposed extensions were based upon evidence in Consolidated's docket; and the similar findings having exclusive relation to O–N–C were based upon evidence in O–N–C's docket. The findings in regard to the existing joint service of Consolidated and O–N–C, and the interchange of the traffic, were, as shown above, taken from evidence which was submitted in both dockets. The findings as to appellees' service and their contentions in opposition to the granting of the applications were based upon their evidence, which, under stipulation, was in both records.

Although the two applications were closely interrelated in important respects, they could not conveniently have been consolidated for hearing because of the many points of difference between them.[21] But from beginning to end the two proceedings were handled concurrently. All hearings were assigned so that one would immediately follow that of the other at the same

[21] For example, Consolidated's application sought authority to operate over the Coast Route between Marshfield, Oregon, and San Francisco but there was no similar proposal in O–N–C's application (R. 42–43).

place.[22] Each applicant intervened in the other proceeding. The principal protestants, including appellees, intervened in both cases, and, as has been brought out above, they, with the consent of other counsel, consolidated the records insofar as concerned their evidence in opposition to that submitted by both applicants in support of their proposals. Much other evidence was made common to both records. While, therefore, the two records were not consolidated *in toto,* they were consolidated, by counsel for the respective parties, to the extent necessary to make both complete.

Thus, the Commission had before it two complete records and there was no occasion or necessity, as to any findings relating exclusively to one of the applicants, to resort to evidence appearing only in the other record.

Both records were before the Commission at the same time and, as they were interrelated, it

[22] The initial hearings were held before Joint Boards 5 and 11 at Portland. The Consolidated case was heard July 8–10 (R. 1504–1899); then the O–N–C case July 11–12 (R. 161–411). The Consolidated case was heard further at Portland July 22–23 (R. 1899–2047), then the O–N–C case July 23–24, at Portland (R. 387–520). The hearings shifted to San Francisco and the O–N–C case was heard August 5–10 (R. 521–938) and the Consolidated case August 8–10 (R. 2049–2329). Adjournment was taken until October, the Consolidated case was further heard at San Francisco October 15, 16 and 20 (R. 2331–2370), and the O–N–C and the Consolidated cases were jointly heard October 15–20 (R. 938–1408). The hearings then returned to Portland and both were concluded October 31, 1940 (R. 1408–1431; 2370–2371).

was appropriate that both cases be decided in one report. In reaching its decision the Commission weighed the evidence in each record, insofar as it related to the proposed extensions northward and southward from Medford and Klamath Falls to Portland and San Francisco, respectively, in order to determine the questions submitted to it simultaneously, whether one or both applications for operating authority covering these extensions should be granted.

While the opinion of the district court states that many instances could be given to show that a finding or conclusion was based upon the records of the two proceedings without discrimination, it cited none. Presumably, however, the court had in mind the following instances alleged by appellees in the oral argument before it:

Appellees referred to the findings in the Commission's report under the heading "Applicants' Present Service," (R. 11–14) and correctly said (R. 121) that the facts stated in the first paragraph (R. 11–12), relating to Consolidated's corporate history, operating authorities, and present service, are based upon the Consolidated record; that the facts stated in the second paragraph (R. 12), giving similar information regarding O–N–C, are based upon the O–N–C record; and that the third paragraph (R. 12), finding certain facts regarding the interchange between Consolidated and O–N–C, are based upon evidence ap-

pearing in both records. They had no complaint regarding these three paragraphs but said that the findings in the remaining five paragraphs were taken in part from one record and in part from the other. The fourth merely recites certain incidents which led to the filing of the applications, and whether the recitations were based upon one record or the other is immaterial,[23] for the question presented by the applications was whether public convenience and necessity warranted the extensions which they proposed. The Commission did not find it necessary to resolve the contentions concerning the reasons for the applications but said:

> To determine which of these two contentions is correct is unnecessary. Certainly any motor carrier may file an application under section 207 (a) of the act and the issues would be, as in these proceedings, whether the proposed service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by an applicant with the new operation or service proposed without endangering or impairing the operations of existing car-

[23] In any event, the facts recited in the paragraph in question are sufficiently shown by matter which is common to both records, *viz.*, the testimony of O-N-C's president (R. 840–841, 848, 878, 882–886, 915–918) and Exhibit 10 (R. 1438), which matter was made a part of both records by stipulation (R. 2369–2370).

riers contrary to the public interest. (R. 38; see also R. 32.)

The facts in the remaining four paragraphs (R. 13–14) under the above-mentioned heading, relating to O–N–C's proposed acquisition of control of Oregon Express as successor of Pacific Seaboard Motor Lines, Inc., and Consolidated's proposed purchase of the operating rights and property of O. J. Mitchell, were taken from two cited reports (*Consolidated Freightways, Inc.—Purchase—Reymers,* 36 M. C. C. 623, and *Oreg.-Nev.-Calif. Fast Frt. Inc.—Control—Oregon Express,* 38 M. C. C. 51) of which the Commission appropriately took official notice.[24]

Appellees, referring to part of the report under the caption "Service Proposed," and especially to the part pertaining to the service proposed by Consolidated, stated that O–N–C "is given full benefit of all the evidence that went in to the Consolidated record dealing with shortening the time to Eastern Oregon and Eastern Washington points" (R. 122). Since O–N–C proposed no extensions into eastern Oregon and Washington enabling it to give single-line service between that

[24] In reference to the statement in the report that the proceeding in *Oreg.-Nev.-Calif. Fast Frt., Inc.—Control—Oregon Express,* had been reopened for further hearing, attention is called to the fact that, after the issuance of the report in the case at bar, a report upon rehearing in that case was rendered, 39 M. C. C. 355, on October 2, 1943, which reversed the former report and granted authority to O–N–C to acquire control of Oregon Express.

territory and San Francisco, and since the proposal in this regard was by Consolidated alone, through extension from Klamath Falls, Oregon, to San Francisco, it is plain that the evidence submitted by Consolidated in this regard had pertinence only to Consolidated's application and, as it in no way aided any part of O–N–C's application, its benefit could not have been accorded to O–N–C.

Appellees also asserted that the testimony of all the O–N–C shipper witnesses, except that of four which was made a part of the Consolidated record, was considered by the Commission as though it were a part of the Consolidated record (R. 122–123).[25] Their only ground for this assertion is the form of the statement in the report (R. 17) to the effect that approximately 120

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[25] The testimony of the 70 shipper witnesses who supported O–N–C's application was kept separate except that of Gregg (R. 603–617), Brannon (R. 745–762), Wilsey (R. 774–786) and Underhill (R. 786–804), which was made a part of the Consolidated record as Exhibits 21–24. Similarly the testimony of the 50 shippers, chambers of commerce, traffic associations, etc., in behalf of Consolidated was kept separate except that of witness Berger representing the Manufacturers' Association of Washington (R. 1886–1898) which, by stipulation, was incorporated, by reference, into the O–N–C record (R. 166, 1889).

The testimony of 8 shipper witnesses who testified in the Consolidated case on behalf of appellee Pierce, *viz.*, Hanns, Marshall, Cook, Moore, Brownson, Brosy, Austin and Gray (R. 1966–2027) was also incorporated by stipulation into the O–N–C record (R. 1966–2037).

shipper-witnesses were called by one or the other of the applicants, but nothing shows that the Commission considered the testimony of the O–N–C shipper witnesses in dealing with Consolidated's application. The shipper testimony appearing in each record was independently strong. The regularity of proceedings before a public body such as the Interstate Commerce Commission is presumed, and its order does not become suspect because attacked in court. *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 602.

In that part of the report which discusses "Public Convenience and Necessity" under the subheading "Proposed speed-up of service," the following statement appears:

> Numerous public witnesses expressed a need for a service that would be time-saving. Some of them asserted that it would increase their business. One in particular is interested in the proposal of Consolidated to improve service between Seattle and intermediate points in Oregon south of Portland. At the present time, this traffic moves from Seattle to Portland one night, lays over at Portland until evening, and then moves to destination the next. The proposal is to render overnight service from Seattle as far south as Eugene and first-noon service to Klamath Falls. There is no such service now available. Although all of these points are now served by Consolidated, it contends that it cannot afford

> such a schedule without the overhead traffic to and from California. (R. 29.)

In reference to this statement appellees stated (R. 157) that obviously the one particular witness referred to testified only in the Consolidated proceeding, that O–N–C did not propose to operate north of Vancouver, Washington,[28] that the statement could have had no proper application to O–N–C, and in the light of the conclusion to grant or deny both applications, that O–N–C was accorded the full benefit of that testimony. Since the report clearly indicates that the testimony related only to a proposal by Consolidated, appellees' contention that O–N–C was accorded the benefit of it is manifestly groundless.

Appellees also referred to that part of the report relating to "Mechanical refrigeration," (R. 29), particularly to the first sentence pointing out the increase in the production of frozen fruits and vegetables in Oregon and Washington, and they said that the figures given are of a character indicating that they came from one record or the other (R. 158). Testimony in the Consolidated record shows that there was a steady increase in the production of frozen fruits and vegetables in Oregon and Washington (R. 1519–1521, 2431–2432). Similar evidence was contained in the

[28] O–N–C's proposal was to extend its route to Portland and serve Glendale, Oregon, and Camas, Washougal and Vancouver, Washington, as off-route points. This authority was granted (R. 41; Appendix B, R. 43).

O–N–C record.[27] Other voluminous evidence, in both records, shows not only that the production of frozen fruits and vegetables was increasing but that the traffic of the interested motor carriers in those commodities was increasing, and that they and numerous other perishable products require refrigeration in transportation.[28] And it was shown, by evidence which the parties made common to both records, that, of the motor carriers operating in the territory involved, only Consolidated and O–N–C were prepared to furnish mechanically refrigerated equipment, except appellee Pierce, which had but one unit so equipped. Hence appellees' contention is untenable that the Commission's findings in regard to production of frozen fruits and vegetables and transportation of these and other perishable products in mechanically refrigerated motor equipment were based upon one record or the other, rather than upon both.

The ultimate separate findings of the Commission, granting the two applications insofar as they sought extensions enabling both applicants

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[27] See *e. g.* R. 434, 486, to the effect that the frozen food industry is progressing and that it is increasing "by leaps and bounds."

[28] From the O–N–C record, see R. 310–321, 330–341, 349–356, 361–366, 369–370, 376–381, 433–443, 443–447, 447–450, 484–490, 516–520, 603–617, 626–644, 698–715, 774–786.

From the Consolidated record, see R. 1602–1625, 1625–1636, 1661–1668, 1684–1696, 1711–1723, 1825–1832, 2208–2223, 2273–2296.

to operate single-line service between San Francisco and Portland, were fully supported by substantial evidence appearing in the respective dockets, and there is no substantiation of the appellees' charge or of the statement of the court below that evidence which appeared only in one record was used to support a general finding as to both applicants.

V

THE COMMISSION WAS NOT REQUIRED TO GRANT A REHEARING

The court below remanded this case to the Commission for rehearing "in order that all parties may be placed on notice as to what type hearing will be held, whether joint or several, and in order that appropriate findings be made as to the public convenience and necessity which requires the authorization of two new through-lines in competition with each other and in competition with the other facilities, and also as to the ability of Consolidated to initiate and maintain one of such lines in view of present conditions" (R. 71–72).[29] For the reasons already

[29] The court intimated that upon rehearing the Commission should follow the court's judgment that only one instead of both of the applications should be granted, for it said (R. 70):

> The disadvantage of joint-line service due to lack of cooperation may not be a factor under present circumstances, but might be considered in permitting one through-line service of either O–N–C or Consolidated.

stated in this brief, we submit that there is no necessity for rehearing on any of these grounds. The court was of the further view (R. 71) that a rehearing should be held because the record had been closed several years before the rendition of its decision (R. 71). While the court said it was apparent to all that changes incident to the war which were kaleidoscopic and vital in nature had taken place, and that "The Supreme Court has not said that *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U. S. 248, would never be followed" (R. 70, 71), the court did not expressly hold that the Commission exceeded its discretion in denying rehearing in this case. But possibly its opinion may be so construed, and, as appellees advanced that contention, it seems appropriate to submit argument upon the point.

In *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 284 U. S. 248, this Court held that the Commission's denial of rehearing under the circumstances there shown was an abuse of discretion and deprived the carriers of a full hearing. The order involved prescribed general reductions in railroad grain rates in the west. Reopening was sought for the submission of evidence of the supervening changes in circumstances caused by the economic depression in the years subsequent to 1929, which had adversely affected the carriers' revenues. But in that case the existence and extraordinary materiality of the

changes in conditions could not be controverted (284 U. S. at pp. 260, 262).

In contrast, here, Consolidated and O–N–C filed persuasive replies to the appellees' petition for rehearing and therein denied or showed the immateriality of the changes (R. 2520–2558; 2558–2580). The petition (R. 2485–2519) alleged that since the hearing applicants interchanged little or no freight with each other, that Consolidated had an interchange arrangement with O. J. Mitchell, and that O–N–C had an interchange arrangement with Oregon Express (R. 2509–2510). The applicants pointed out, however, that the operating rights of Mitchell and Oregon Express were uncertain, and that the arrangements with them were temporary and unstable, and did not constitute a reliable single-line service which would serve the entire area (R. 2536–2538, 2576).

Appellees urged further that under the speed limit of 35 miles per hour fixed by the Office of Defense Transportation applicants could not meet their proposed expedited schedules (R. 2495–2497). The Commission's report pointed out that this speed limit would affect all schedules (R. 29). The Commission of course knew that this was only a temporary war-time limitation, and it has since been revoked.

Both applicants pointed out in their replies that their own traffic had greatly increased, illustrating the public need for the new service, and they

furnished figures to show that the traffic of the appellees had also expanded (R. 2535, 2554–2557, 2575), a fact which appellees' petition admitted. Finally, appellees asserted that their service had improved in the interim and that they had added several mechanically refrigerated units. But applicants showed in reply that none of the existing operators, either because of restrictions in their certificates, or because of their own limitations, were yet furnishing adequate single-line service between Portland and San Francisco (R. 2536–2538, 2577–2578).

In *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, this Court said (p. 514):

> One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order liti-

> gants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body.

See also *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, 494; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 389.

The court below did not restrict its deliberations to the question whether the Commission, upon consideration of the allegations of the petition for rehearing and the replies thereto, abused its discretion in denying rehearing. Instead, it exercised its own independent judgment upon the question whether there ought to be a rehearing. This action transgressed the principle of the *Jersey City* case, which recognized that the discretion to be invoked is that of the administrative body rather than that of the reviewing court.

CONCLUSION

The decree of the district court should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

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APPENDIX

PART II OF THE INTERSTATE COMMERCE ACT, AS AMENDED

Section 205 (a) provides in part:

> The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations or motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates. * * * (49 U. S. C. 305 (a).)

Section 205 (b) provides in part:

> * * * If the board of each State from which a member of a joint board is entitled to be appointed shall waive action on any matter referred to such joint board, or if any joint board fails or refuses to act, or is unable to agree upon any matter submitted to it within forty-five days after the matter is referred to it or such other period as the Commission may authorize, or if a member shall not be nominated for more than one State (except only when the operations proposed shall be into or through territory foreign to the United States), then such matter shall be decided as in the

case of any matter not required to be referred to a joint board. * * * (49 U. S. C. 305 (b).)

Section 205 (e) provides:

> In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties. (49 U. S. C. 305 (e).)

Section 206 (a) provides in part:

> Except as otherwise provided in this section and in section 210a [relating to temporary operating authority, not here involved] no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations [subject to a proviso known as the "grandfather" clause, not here involved]. (49 U. S. C. 306 (a).)

Section 207 (a) provides:

> Subject to section 210 [relating to dual operations as common and contract carrier,

not here involved], a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. (49 U. S. C. 307 (a).)

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